A

PP

v.

LOH KAH LOON

B

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
ZAINUN ALI JCA
ABU SAMAH NORDIN JCA
[CRIMINAL APPEAL NO: J-05-84-2007]

C

4 JULY 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 115.54 grams of methamphetamine - End of prosecution case - Charge reduced to one of possession - Whether against weight of*

D

evidence - Respondent throwing plastic bag containing drugs out of moving car when chased by police - Whether knowledge could be safely inferred - Whether mens rea possession proved - Presumption of trafficking - Whether to be invoked - Whether to enter defence on original charge - Dangerous Drugs Act 1952, ss. 37(d), 37(da) 39A(2), 3B(1)(a)

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This was an appeal against the decision of the learned Judicial Commissioner ('JC') amending, at the close of the prosecution's case, the charge of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') against

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the respondent to one of possession punishable under s. 39A(2) thereof. It was the learned JC's view, in so reducing the charge and invoking the statutory presumption of possession in s. 37(d) DDA, that although the respondent had control and custody of the 115.54 grams of methamphetamine contained in the plastic bag

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P6, the respondent did not have the requisite knowledge of the drugs. There was no dispute that the respondent was seen to have thrown out P6 from the car he was driving, upon being chased by the police, and that he was at the material time alone in the car. That notwithstanding, the learned JC, relying *inter alia*

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on *Abdullah Zawawi Yusoff v. PP* and *Tai Chai Koh v. PP*, ruled that the conduct of the respondent in speeding off when chased by the police did not mean that he had guilty knowledge. Likewise, it was held that the act of throwing out P6 during the chase was capable of more than one inference as the respondent

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did not have the exclusive use of the car the same being owned by his mother. The prosecution argued that in the absence of any

reasonable or plausible explanation by the respondent, the facts as adduced were sufficient to establish possession of the drugs independent of the s. 37(d) presumption. It was contended that, since actual possession had been proved through evidence, the amount of dangerous drugs so found in the respondent's possession, namely 115.54 grams, should have triggered the presumption of trafficking under s. 37(da) of the DDA and the learned JC therefore had misdirected himself when reducing the charge the way he did. Before the learned appellate judges, the issue that arose whether the respondent, on the facts and in the circumstances, could be said to have had *mens rea* possession of the methamphetamine in question.

Held (allowing appeal, setting aside conviction and sentence and ordering defence to be called on original charge of trafficking)
Per Tengku Baharudin Shah JCA delivering the judgment of the court:

(1) There can be no doubt that the respondent being the only person in the car was so situated with respect to the drugs in P6 that he had the power to deal with them as owner to the exclusion of all other persons, and was so circumstanced that he may not only intend to deal with them when he saw the occasion to do so, but did in fact do so by disposing the same when he physically threw P6 out of the window of the moving car (*Chan Pean Leon v. PP* and *PP v. Abdul Rahman Akif* followed). Hence, on the uncontroverted facts and in the absence of any explanation by the respondent, there was ample evidence adduced for the court to draw an irresistible inference that the respondent knew about the drugs and had them in possession. (paras 5-7)

(2) The accused in *Abdullah Zawawi* took to his heels upon the police announcing the discovery of the said drugs. On appeal, the Federal Court, while observing that such conduct of the accused was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt, nonetheless ruled that it was also conduct equally consistent with the accused having been in a state of panic, bearing in mind that he took to his heel only **after** the discovery of the drugs was announced. It was also evident that the Federal Court had put emphasis on the word

after in distinguishing its decision from that of the Privy Council in the Jamaican case of *DPP v. Brooks*. In the present case, unlike in *Abdullah Zawawi*, the respondent took off immediately upon being made aware of police presence and well **before** the drugs were discovered. (para 12)

(3) The respondent's act of throwing P6 out of the car while being chased by police vehicles is a deliberate act of a person caught red handed trying to distance himself from the offending substance that he knew he had with him. He might very well have been surprised by the police approach but its effect was long gone, and he might very well have so acted in panic but not for lack of knowledge of its contents but rather for fear of not being able to dissociate himself from its discovery if caught. He had no reason to throw it away if he was unaware of its presence or did not know it contained drugs. The drugs were neither locked nor concealed in P6 and were in fact contained in transparent plastic packets which contents required little effort on his part to discover. The respondent's conduct in the circumstances can have no other inference but of his knowledge and guilt. For the same reason what happened here is factually distinguishable from that in the other cases cited by the learned JC to support his finding. (para 13)

(4) On the proven facts of this case, the learned JC ought to have made a finding of possession independent of the presumption under s. 37(d) of the DDA. The learned JC further ought to have triggered the presumption of trafficking, considering that the amount of the drugs recovered was more than twice of that prescribed under s. 37(da) (xvi) DDA. It follows that the respondent's defence must be called on the original charge under s. 39B(1)(a) DDA. (para 16)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan yang arif Pesuruhjaya Kehakiman ('PK') kerana meminda, di akhir kes pendakwaan, pertuduhan mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') terhadap responden kepada kesalahan memiliki yang boleh dihukum di bawah s. 39A(2) DDA. Menjadi pandangan yang arif PK, dalam menurunkan pertuduhan dan menggunapakai anggapan milikan di dalam s. 37(d) DDA,

bahawa walaupun responden mempunyai kawalan dan jagaan terhadap 115.54 gram methamphetamine yang terkandung di dalam beg plastik P6, responden tidak mempunyai pengetahuan tentang dadah tersebut. Tidak dinafikan bahawa responden telah dilihat melemparkan P6 keluar kereta yang dipandunya, setelah dikejar oleh polis, dan bahawa beliau pada waktu itu berseorangan di dalam kereta. Walaupun begitu, yang arif PK, dengan bergantung kepada *Abdullah Zawai Yusoff v. PP* dan *Tai Chai Koh v. PP,* merumuskan bahawa kelakuan responden dalam memecut laju setelah dikejar polis tidak bermakna beliau mempunyai pengetahuan jenayah. Begitu juga, ianya diputuskan bahawa perbuatan membuang keluar P6 semasa kejar mengejar boleh membangkitkan lebih dari satu andaian disebabkan responden tidak mempunyai penggunaan ekslusif kereta kerana pemilik kereta adalah ibu responden. Pendakwaan pada asasnya berhujah bahawa dalam ketiadaan apa-apa penjelasan munasabah dan menyakinkan dari pihak responden, fakta seperti yang dikemukakan memadai untuk membuktikan milikan dadah tanpa perlu bergantung kepada anggapan s. 37(d). Selanjutnya, oleh kerana milikan sebenar telah dibuktikan melalui keterangan, jumlah dadah berbanya yang dijumpai di dalam milikan responden, iaitu 115.54 gram, seharusnya telah menjerat anggapan mengedar di bawah s. 37(da) DDA dan kerana itu yang arif PK silap apabila menurunkan pertuduhan sepertimana yang dilakukannya. Di hadapan yang arif hakim-hakim Mahkamah Rayuan di sini, persoalan penting yang berbangkit adalah sama ada responden dalam halkeadaan yang wujud boleh dikatakan mempunyai milikan *mens rea* methamphetamine tersebut.

Diputuskan (membenarkan rayuan, mengenepikan sabitan dan hukuman dan memerintahkan pembelaan dipanggil atas pertuduhan asal pengedaran):
Oleh Tengku Baharudin Shah HMR menyampaikan penghakiman mahkamah

(1) Tidak dapat dinafikan bahawa responden yang berseorangan di dalam kereta berada pada kedudukan yang sebegitu rupa bersabit dengan dadah di dalam P6 sehingga berupaya berurusan dengannya seolah-olah beliau adalah pemiliknya yang tunggal tanpa diganggu gugat oleh sesiapa pun, dan berada dalam keadaan yang menunjukkan beliau bukan sahaja mungkin berniat untuk berurusan dengannya apabila berpeluang berbuat begitu malah telah sebenarnya berbuat demikian dengan

melupuskan dadah itu apabila beliau membuang keluar P6 dari kereta yang sedang bergerak tersebut (*Chan Pean Leon v. PP* dan *PP v. Abdul Rahman Akif* diikuti). Maka berdasarkan fakta-fakta yang tak disangkal serta ketiadaan apa-apa penjelasan di pihak responden, keterangan yang dikemukakan adalah lebih dari mencukupi untuk membolehkan mahkamah membuat inferens jitu bahawa responden mempunyai pengetahuan mengenai dadah dan mempunyai milikan dadah tersebut.

(2) Tertuduh di dalam *Abdullah Zawawi* telah melarikan diri sebaik polis mengisytiharkan dadah ditemui. Di rayuan, Mahkamah Persekutuan, sementara menyatakan bahawa kelakuan tertuduh tersebut adalah konsisten dengan beliau mengetahui tentang kewujudan dadah di dalam kotak sebelum penemuannya, sekaligus menunjukkan rasa bersalahnya, bagaimanapun memutuskan bahawa ianya juga adalah konsisten dengan tertuduh berada dalam keadaan panik, mengambilkira bahawa beliau melarikan diri hanya **selepas** penemuan dadah diisytiharkan. Juga jelas bahawa Mahkamah Persekutuan telah memberi penekanan ke atas perkataan **selepas** apabila membezakan keputusannya dengan keputusan Majlis Privi dalam kes Jamaica *DPP v. Brooks*. Dalam kes semasa, tidak seperti di dalam *Abdullah Zawawi*, responden melarikan diri dengan serta merta apabila mengetahui kehadiran polis dan lama **sebelum** penemuan dadah.

(3) Tindakan responden membuang P6 keluar dari kereta apabila dikejar oleh kenderaan polis adalah satu tindakan seorang yang merasa tergugat kerana dilihat cuba melepas diri dari barang salah yang dia ketahui berada dengan dirinya. Mungkin beliau terkejut dengan kehadiran polis namun kesan dari kehadiran itu sudah lama berlalu, dan mungkin juga beliau bertindak dalam keadaan panik namun ia bukan berpunca dari ketandusan pengetahuan tentang kandungannya sebaliknya kerana takut tidak dapat memisahkan dirinya dari penemuan barang tersebut jika ditangkap. Beliau tiada alasan untuk membuangnya jika beliau tidak mengetahui tentang kewujudannya atau bahawa ia mengandungi dadah. Dadah di dalam P6 bukan berkunci atau terselindung dan malah terkandung dalam paket-paket plastik lutsinar kandungan mana hanya memerlukan sedikit usaha oleh responden untuk mengetahuinya. Kelakuan responden dalam halkeadaan yang wujud tidak membangkitkan inferens lain

selain dari pengetahuan dan kebersalahannya. Atas alasan yang sama apa yang berlaku di sini adalah berbeza dari segi fakta dengan apa yang berlaku dalam kes-kes lain yang dijadikan pergantungan oleh yang arif PK untuk menyokong dapatannya.

(4) Atas fakta yang telah dibuktikan di sini, yang arif PK seharusnya membuat dapatan milikan bebas dari anggapan s. 37(d) ADB. Yang arif PK seharusnya membangkitkan anggapan pengedaran, mengambilkira berat dadah yang ditemui adalah dua kali ganda dari apa yang ditetapkan oleh s. 37(da)(xvi) ADB. Ianya mengikut bahawa defendan harus dipanggil untuk membela diri di bawah pertuduhan asal di bawah s. 39B(1)(a) ADB.

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(dist)***
Chan Pean Leon v. PP [1956] 1 LNS 17 ***(foll)***
DPP v. Brooks [1974] All AR 840 ***(refd)***
Liew Chee Hong v. PP [2007] 6 CLJ 702 CA ***(dist)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC ***(refd)***
Reza Mohd Shah Ahmad Shah v. PP [2005] 4 CLJ 581 CA ***(refd)***
Ruslan Sabu v. PP [2006] 3 CLJ 607 CA ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 22 ***(refd)***
Taib Mohamad v. PP [2002] 3 CLJ 680 ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da)(xvi), 39A(2), 39B(1)(a)

For the appellant - K Mangai DPP
For the respondent - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co

[Appeal from High Court, Johor Bahru; Criminal Trial No: 45-62-2003]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Tengku Baharudin Shah JCA:

[1] This is an appeal by the learned Public Prosecutor against the decision of the learned Judicial Commissioner (JC) at the High Court in Johor Bahru amending the original charge of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs

A Act 1952 (DDA) to one of possession punishable under s. 39A(2) at the close of the prosecution's case against the respondent who was then, on his own plea of guilt, convicted of the amended charge and duly sentenced.

B **[2]** The main complaint of the learned deputy here is against the learned JC's failure to consider that the prosecution had, on the evidence adduced at trial, sufficiently established that the respondent was in possession of the drugs independent of the presumption under s. 37(d) DDA. It was submitted that the C learned JC correctly found the respondent in custody and control of the plastic bag P6, which he threw out of the car he was driving while being chased by the police, but wrongly held that the respondent did not have the requisite knowledge of the drugs contained therein. He had invoked the statutory presumption of D possession though evidence of actual possession of the drugs had been proved against the respondent. The amount of the drugs so found in the respondent's possession would have triggered the presumption of trafficking under s. 37(da) DDA. He is thus alleged to have misdirected himself when he reduced the charge as he did.

E **[3]** The following facts of the case are basically not in dispute. Acting on information received ASP Charun (SP3) and his men in two vehicles went to Taman Desa Jaya, Johor Bahru. Upon arrival there they saw the target car, a white Kancil, parked by the road F side with the driver, subsequently identified as the respondent, being the only occupant. SP3's vehicle stopped near the Kancil and SP3 got out of the car, approached the respondent and identified himself as a police officer. The Kancil suddenly sped off and the two police vehicles gave chase. During the chase SP3 G saw, as did SP5, who was driving him, and SP6 in the police van following behind, the respondent throwing something out of the driver's window on to the road divider. On SP3's direction through the walkie talkie SP6 recovered that something, a green and white plastic bag P6, which was handed to SP3 when he H came back to the spot after the respondent's arrest. P6 was found to only contain two transparent plastic packets of some crystal like substance which, when subsequently analysed by the chemist SP2, was confirmed to contain 115.54 gm of methamphetamine, the subject of the charge (the drugs). Possession of 50 gm or more in I weight of methamphetamine would trigger the presumption of trafficking under s. 37(da)(xvi) DDA.

[4] The trial court found itself only faced with two issues at the close of the prosecution ie, whether there was any doubt as to the identity of the exhibit recovered and whether the respondent had *mens rea* possession of the drugs. Our concern in this appeal therefore is only with the second question which the learned JC answered in the negative. Though he agreed with the prosecution that, based on the evidence adduced, the respondent had custody and control of the drugs, he felt the need to further consider whether there was evidence to infer that the respondent had the requisite knowledge and on the available evidence found he did not.

[5] On the uncontroverted facts before the court, the learned deputy's complaint is not unjustified as there is ample evidence adduced for the court, in the absence of possible explanation, to draw an irresistible inference that the respondent knew about the drugs and hence had them in his possession. The following oft-quoted passages from the judgment of Thomson J (as he then was) in *Chan Pean Leon v. PP* [1956] 1 LNS 17 bear repetition as to the meaning of possession in criminal law:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi.*
>
> … it must be clear that the circumstances in which it is found shew such an intention … But there must be something in the evidence to satisfy the Court that the person who is physically in a position to deal with the thing as his own had the intention of doing so …

[6] Applying that to the circumstances of this case, there can be no doubt that the respondent being the only person in the car was so situated with respect to the drugs in P6 that he had the power to deal with them as owner to the exclusion of all other persons, and was so circumstanced that he may not only intend to deal with them when he saw the occasion to do so, but did in fact do so by disposing the same when he physically threw P6 out of the window of the moving car.

[7] The Federal Court in the most recent case of *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 held that from the evidence adduced in that case that the respondent was the only person in the car at the material time, the drugs were found hidden under the driver's seat and front passenger seat, and PW8's evidence that the car was in the possession of the respondent for more that seven months prior to his arrest, in the absence of a plausible explanation from the respondent the irresistible inference to be drawn in the circumstances is that the respondent all along knew about the drug found in the car and that there was evidence of possession of the drug independent of s. 37(d) DDA.

[8] It was indeed the contention of the learned deputy that on the facts of this case too, in particular, that the respondent was alone in the car at the material time, he sped off in his car upon SP3 introducing himself as a police officer, his act of throwing plastic bag P6 out of the car while being chased by the police and the fact that the drugs were wrapped in transparent plastic packets in unfastened P6, the trial court should have inferred that the respondent knew that P6 contained drugs. In the absence of any reasonable or plausible explanation by the respondent these facts are sufficient for the court to find him to be in possession of the said drugs independent of s. 37(d).

[9] We find no cause to disagree. If the Federal Court found the inference of knowledge irresistible in the absence of any overt act on the part of the respondent in *Abdul Rahman Akif (supra)* there is no reason why the trial court could not find the inference of knowledge irresistible in this case when the respondent had undoubtedly by his overt act assumed control of P6 which only contained the drugs. To quote Lord Morris in his judgment in *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356 cited in *Abdul Rahman Akif (supra)*:

> If, however, someone deliberately assumes control of some package or container, then I would think he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it.

[10] On behalf of the respondent learned counsel submitted that there was no misdirection by the trial court as the prosecution was relying on the respondent's conduct – see *Liew Chee Hong v. PP* [2007] 6 CLJ 702. Echoing the reasoning of the learned JC he said the fact that the respondent sped off when confronted by police did not mean he had guilty knowledge. The court took guidance from *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 and *Tai Chai Keh v. PP* [1948] 1 LNS 22 in holding that such conduct was also consistent with innocence as the respondent probably panicked upon being approached by a police officer in plain clothes. It was also maintained that the act of the respondent throwing out P6 during the chase was correctly held to be capable of more than one inference as the respondent did not have the exclusive use of the car which belonged to his mother SP1. Counsel emphasized that it was so held in similar situation by this court in *Reza Mohd Shah Ahmad Shah v. PP* [2005] 4 CLJ 581 and by the FC in *PP v. Tan Tatt Eek* [2005] 4 CLJ 460. It was also submitted that in view of conflicting decisions of the apex court on the issue, the trial court was free to choose which ever appropriate higher authority to follow.

[11] In *Liew Chee Hong (supra)* the learned trial judge found the appellant to be in possession of the drug with knowledge being inferred from his own conduct in throwing it out of his motorcycle and attempting to escape while the police tried to apprehend him. In the same breadth it was also held that such conduct of the appellant could also be imputed to his reaction when taken by surprise which conduct would not then infer knowledge of the drug being carried. The learned judge there clearly misdirected himself in that after having found the facts of the case to admit more than one inference he chose to adopt, contrary to *Tan Chai Koh (supra)*, the inference that was not favourable to the appellant. It was for that reason that the conviction for trafficking could not be supported on appeal and was set aside to be substituted with a conviction for possession which was presumed under s. 37(d) DDA. The circumstances are not the same in our case.

[12] *Abdullah Zawawi (supra)*, relied on by the learned JC, is clearly distinguishable on its facts. There, the house occupied by the accused, his wife, their children and another man was raided by a police party on information received. Their search revealed

A nothing incriminating until they came to a locked almeira. When they asked the accused for the key he said it was with his wife and called out to her who was outside the house. She hurriedly came up, fetched the key and opened the almeira wherein were recovered a box containing dangerous drugs. The accused took to B his heels upon the police announcing the discovery of the said drugs. He was convicted of trafficking while his wife was acquitted. On appeal, the Federal Court made the observation that such conduct of the accused was consistent with his having known of the presence of the drugs in the box before their C discovery, indicating thereby a sense of guilt. On the other hand, it was conduct equally consistent with the accused having been in a state of pure panic, bearing in mind that he took to his heels only after (emphasized) the discovery of the drugs was announced. It was explained that an innocent man faced with the prospect of D arrest on a capital charge might foolishly react in that way. In our case, unlike in *Abdullah Zawawi (supra)*, the respondent took off immediately upon being made aware of police presence and well before the drugs were discovered. As pointed out by the learned deputy, the Federal Court in that case put emphasis on the word E after in distinguishing its decision from that of the Privy Council in the Jamaican case of *DPP v. Brooks* [1974] All AR 840 cited by the prosecution where the accused who occupied the driver's seat of the van containing 1000 lbs of ganja together with several others scrambled out of the van and ran off when police officers F hurried towards the van before the drugs were discovered.

[13] The respondent's act of throwing P6 out of the car while being chased by the police vehicles is a deliberate act of a person caught red handed trying to distance himself from the offending G substance that he knew he had with him. He might very well have been surprised by the police approach but its effect was long gone, and he might very well have so acted in panic but not for lack of knowledge of its contents but rather for fear of not being able to disassociate himself from its discovery if caught. He had H no reason to throw it away if he was unaware of its presence or did not know it contained drugs. The drugs were neither locked nor concealed in P6 and were in fact contained in transparent plastic packets which contents required little effort on his part to discover. The respondent's conduct in the circumstances aforesaid I can have no other inference but of his knowledge and guilt. For

the same reason what happened here is factually distinguishable from that in the other cases cited by the learned trial JC to support his finding.

[14] In any event, knowledge like intention is a mental element of the state of mind of a person. It cannot be proved by direct evidence. Short of an admission it can only be proved by inference from the surrounding circumstances or judged from a person's outward acts or omissions. It is the cumulative effect of such circumstances or demeanour that would determine whether or not the requisite knowledge can be irresistibly inferred. While the respondent might have reasonably taken flight upon being surprised by the approach of the police for whatever reason, his subsequent conduct of throwing P6 out of the car during the chase evidences his deliberate act of asserting exclusive control over it (including its only contents) which necessarily infers his knowledge of the presence of the drugs for otherwise he would not have seen the need to distant himself from them by getting rid of them when he had the opportunity to do so. In similar situation (except for the act of throwing preceding the flight) this court in *Ruslan Sabu v. PP* [2006] 3 CLJ 607 held that the fact the appellant could see the illicit drugs contained in the 2 transparent plastic bags he was carrying was sufficient to satisfy the mens rea element of possession. That conclusion coupled with his act of throwing away the two bags and running off after being ordered to stop led to the only inference that could be drawn, which is that he knew he was carrying illicit drugs. *PP v. Tan Tatt Eek (supra)* and *Taib Mohamad v. PP* [2002] 3 CLJ 680 were distinguished therein on the facts.

[15] The question of conflict of authorities and of the trial court having the choice of which decision to follow are matters which must be left to another occasion. They are not relevant for our consideration nor were they relied on or considered by the trial JC.

[16] In the upshot, we find that the learned trial JC after having rightly made a finding of fact on custody and control of the drugs misdirected himself in relying on *Abdullah Zawawi (supra)* and similar cases which facts are totally distinguishable. On the proven facts of this case he should have made a finding of possession independent of the presumption under s. 37(d) DDA and with the amount of the drugs recovered being more than twice that

prescribed under s. 37(da)(xvi) DDA, the presumption of trafficking was triggered. The respondent's defence ought to have been called on the original charge proferred against him.

[17] Accordingly, the appeal was allowed and the conviction and sentence set aside. The case was remitted back to the High Court for the accused's defence to be called on the original charge under s. 39B(1)(a) DDA.